No. 7773

In the United States Circuit Court of Appeals for the Ninth Circuit

CITY OF COEUR D'ALENE, IDAHO, A MUNICIPAL CORPORATION; J. K. COE, MAYOR; A. GRANTHAM, TREASURER; WILLIAM T. REED, CLERK; LEE STODDARD, OTTO GLADDEN, FRANK H. LAFRENZ, JOSEPH LOIZEL, O. M. HUSTED, CASSIUS ROBINSON, S. H. MCEUEN AND C. C. HODGE, MEMBERS OF THE CITY COUNCIL OF SAID CITY OF COEUR D'ALENE, IDAHO; AND HAROLD L. ICKES, AS FEDERAL EMERGENCY ADMINISTRATOR OF PUBLIC WORKS, APPELLANTS

v.

THE WASHINGTON WATER POWER COMPANY, A CORPORATION, APPELLEE

APPENDIX TO BRIEF OF APPELLEE

The General Welfare Clause as interpreted by the Presidents and Certain Writers on the Constitution.

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We are including herein statements of authority to which we have referred in the brief, showing the executive construction given to the General Welfare Clause and quotations from authorities with respect thereto:

JEFFERSON

Jefferson's opinion on the Bank of the United States, contains the following statement:

> "To lay taxes to provide for the general welfare of the United States is to lay taxes *for the purpose* of providing for the general welfare. For the laying of taxes is the *power,* and the general welfare the *purpose,* for which the power is to be exercised. Congress are not to lay taxes *ad libitum,* for any purpose they please; but only to pay the debts, or provide for the welfare of the Union. In like manner they are not to do anything they please to provide for the general welfare, but only to lay taxes for that purpose. To consider the latter phase not as describing the purpose of the first, but as giving a distinct and independent power to do any act they please which might be for the good of the Union, would render all the preceding and subsequent enumerations of power completely useless. It would reduce the whole instrument to a single phase, that of instituting a congress with power to do whatever would be for the good of the United States; and, as they would be the sole judges of the good or evil, it would also be a power to do whatever evil they pleased. It is an established rule of construction, where a phrase will bear either of two meanings, to give that which will allow some meaning to the other parts of the instrument, and not that which will render all the others useless. Certainly,

no such universal power was meant to be given them. It was intended to lace them up strictly within the enumerated powers, and those without which, as means, those powers could not be carried into effect."

Writings of Thomas Jefferson, Library Edition, 1903, Vol. III, p. 148; also

Story on the Constitution, Sec. 926.

In his Sixth Annual Message of December 2, 1806, Jefferson again recognizes the Madison interpretation is the correct one. He says:

"Their patriotism would certainly prefer its continuance and application to the great purposes of the public education, roads, rivers, canals, and such other objects of public improvement as it may be thought proper to add to the constitutional enumeration of Federal powers. By these operations new channels of communication will be opened between the States, the lines of separation will disappear, their interests will be identified and their union cemented by new and indissoluble ties. Education is here placed among the articles of public care, not that it would be proposed to take its ordinary branches out of the hands of private enterprise, which manages so much better all the concerns to which it is equal, but a public institution can alone supply those sciences which though rarley called for are yet necessary to complete the circle, all the parts of which contribute to the improvement of the country and some of them to its preservation. The subject is now proposed for the consideration of Congress, because if approved by the time the State legislatures shall have deliberated on this extension of the Federal trusts, and the laws shall be passed and other arrangements made

for their execution, the necessary funds will be on hand and without employment. I suppose an amendment to the Constitution, by consent of the States, necessary, because the objects now recommended are not among those enumerated in th Constitution, and to which it permits the public moneys to be applied.

"The present consideration of a national establishment for education particularly is rendered proper by this circumstance also, that if Congress approving the proposition, shall yet think it more eligible to found it on a donation of lands, they have it now in their power to endow it with those which will be among the earliest to produce the necessary income."

Messages and Papers of the Presidents, Vol. 1, pp. 409-410.

MADISON

Madison's Veto Message of March 3, 1817, Messages and Papers of the Presidents, Vol. 1, pp. 584, 585. In this message it is said:

"The legislative powers vested in Congress are specified and enumerated in the eighth section of th first article of the Constitution, and it does not appear that the power proposed to be exercised by the bill is among the enumerated powers, or that it falls by and just interpretation within the power to make laws necessary and proper for carrying into execution those or other powers vested by the Constitution in the Government of the United States. * * *

"To refer the power in question to the clause 'to provide for the common defense and general welfare' would be contrary to the

established and consistent rules of interpretation, as rendering the special and careful enumeration of powers which follow the clause nugatory and improper. Such view of the Constitution would have the effect of giving to Congress a general power of legislation instead of the defined and limited one hitherto understood to belong to them, the terms 'common defense and general welfare' embracing every object and act within the purview of a legislative trust. It would have the effect of subjecting both the Constitution and laws of the several States in all cases not specifically exempted to be superseded by laws of Congress, it being expressly declared 'that the Constitution of the United States and laws made in pursuance thereof shall be the supreme law of the land, and the judges of every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding.' Such a view of the Constitution, finally, would have the effect of excluding the judicial authority of the United States from its participation in guarding the boundary between the legislative powers of the General and the State Governments, inasmuch as questions relating to the general welfare, being questions of policy and expediency, are unsusceptible of judicial cognizance and decision.

"A restriction of the power 'to provide for the common defense and general welfare' to cases which are to be provided for by the expenditure of money would still leave within the legislative power of Congress all the great and most important measures of Government, money being the ordinary and necessary means of carrying them into execution.

> "If a general power to construct roads and canals, and to improve the navigation of water courses, with the train of powers incident thereto, be not possessed by Congress, the assent of the States in the mode provided in the bill cannot confer the power. The only cases in which the consent and cession of particular States can extend the power of Congress are those specified and provided for in the Constitution."

He suggests that an amendment might give such power to the Federal Government.

Madison's letter to Andrew Stevenson contains a complete statement of his views with reference to the General Welfare Clause. It is printed in Vol. IX, p. 411, Writings of Madison, Hunt Edition, also Madison's Works, published by Order of Congress, Vol. IV, p. 121. It is as follows:

> "To Andrew Stevenson. Mad. Mss.
>
> Montpr., Novr. 27, 1830.
>
> Dr. Sir. I have recd. your very friendly favor of the 20th instant, referring to a conversation when I had lately the pleasure of a visit from you, in which you mentioned your belief that the terms 'common defence & general welfare' in the 8th section of the first article of the Constitution of the U. S. were still regarded by some as conveying to Congress a substantive & indefinite power, and in which I communicated my views of the introduction and occasion of the terms, as precluding that comment on them, and you express a wish that I would repeat those views in the answer to your letter.

However disinclined to the discussion of such topics at a time when it is so difficult to separate in the minds of many, questions purely constitutional from the party polemics of the day, I yield to the precedents which you think I have imposed on myself, & to the consideration that without relying on my personal recollections, which your partiality over-values, I shall derive my construction of the passage in question from sources of information & evidence known or accessible to all who feel the importance of the subject, and are disposed to give it a patient examination.

In tracing the history & determining the import of the terms 'common defence & general welfare' as found in the text of the Constitution, the following lights are furnished by the printed Journal of the Convention which formed it:

The terms appear in the general propositions offered May 29, as a basis for the incipient deliberations, the first of which 'Resolved that the articles of Confederation ought to be so corrected & enlarged as to accomplish the objects proposed by their institution, namely, common defence, security of liberty and general welfare.' On the day following, the proposition was exchanged for 'Resolved that a Union of the States merely Federal will not accomplish the objects proposed by the Articles of Confederation, namely, common defence, security of liberty and general welfare.'

The inference from the use here made of the terms & from the proceedings on the subsequent propositions is, that altho common defence & general welfare were objects of the Confederation, they were limited objects, which ought to be enlarged by an enlargement of the particular

powers to which they were limited, and to be accomplished by a change in the structure of the Union from a form merely Federal to one partly national; and as these general terms are prefixed in the like relation to the several legislative powers in the new charter, as they were in the old, they must be understood to be under like limitations in the new as in the old.

In the course of the proceedings between the 30th of May and the 6th. of Augt., the terms common defence & general welfare, as well as other equivalent terms, must have been dropped; for they do not appear in the Draft of a Constitution, reported on that day by a committee appointed to prepare one in detail, the clause in which those terms were afterward inserted, being in the Draft simply, 'The Legislature of the U. S. shall have power to lay & collect taxes, duties, imposts, & excises.'

The manner in which the terms became transplanted from the old into the new system of Government, is explained by a course somewhat adventitiously given to the proceedings of the Convention.

On the 18th. of Augst. among other propositions referred to the committee which had reported the draft, was one 'to *secure* the payment of the public debt' and

On the same day was appointed a committee of eleven members, (one from each State) 'to consider the necessity & expediency of *the debts of the several States,* being assumed by the U. States.'

On the 21st. of Augst. this last committee reported a clause in the words following: 'The Legislature of the U. States *shall have power*

to fulfil the engagements *which have been* entered into by Congress, and to discharge as well the debts of the U. States, as the debts incurred by the *several* States *during the late war,* for the *common defence* and *general welfare;* conforming herein to the 8th of the Articles of Confederation the language of which is, that 'all charges of war, and all other expenses that shall be incurred for the common defence and general welfare, and allowed by the U. S. in Congress assembled, shall be defrayed out of a common Treasury' &c.

On the 22d. of Augst. the committee of five reported among other additions to the clause *giving power* 'to lay and collect taxes imposts & excises,' a clause in the words following, 'for payment of the debts and necessary expenses,' with a proviso qualifying the duration of Revenue laws.

This Report being take up, it was moved, as an amendment, that the clause should read, 'The Legislature *shall* fulfill the engagements and discharge the debts of the U. States.'

It was then moved to strike out 'discharge the debts,' and insert, 'liquidate the claims,' which being rejected, the amendment was agreed to as proposed, viz.: 'The Legislature *shall* fulfil the engagements and discharge the debts of the United States.'

On the 23d. of Augst. the clause was made to read 'The legislature shall fulfil the engagements and discharge the debts of the U. States, and shall have the power to lay & collect taxes imposts & excises' the two powers relating to taxes & debts being merely transposed.

On the 25th. of August the clause was again altered so as to read 'All debts contracted and engagements entered into by or under the authority of Congress, (the Revolutionary Congress) shall be as valid under this constitution as under the Confederation.'

This amendment was followed by a proposition referring to the powers to lay & collect taxes, &c. and to discharge the (*old* debts) to add, 'for payment of *said* debts, and for defraying the *expenses that shall be* incurred *for the common defence and general welfare.*' The proposition was disagreed to, one State only voting for it.

Sept. 4. The committee of eleven reported the following modification—'The Legislature shall have power to lay & collect taxes duties imposts and excises, to pay the debts and provide for the common defence & general welfare;' thus retaining the terms of the Articles of Confederation, & covering by the general term 'debts,' those of the old Congress.

A special provision in this mode could not have been necessary for the debts of the new Congress: For a power to provide money, and a power to perform certain acts of which money is the ordinary & appropriate means, must of course carry with them a power to pay the expense of performing the acts. Nor was any special provision for debts proposed, till the case of the Revolutionary debts was brought into view; and it is a fair presumption from the course of the varied propositions which have been noticed, that but for the old debts, and their association with the terms 'common defence & general welfare,' the clause would have remained as reported in the first draft of a Constitution, expressing generally,

'a power in Congress to lay and collect taxes, duties, imposts & excises,' without any addition of the phrase, 'to provide for the common defence & general welfare.' With this addition, indeed, the language of the clause being in conformity with that of the clause in the Articles of Confederation, it would be qualified, as in those articles, by the specification of powers subjoined to it. But there is sufficient reason to suppose that the terms in question would not have geen introduced but for the introduction of the old debts, with which they happened to stand in a familiar tho' inoperative relation. Thus introduced, however, they passed undisturbed thro' the subsequent stages of the Constitution.

If it be asked why the terms 'common defence & general welfare,' if not meant to convey the comprehensive power which taken literally they express, were not qualified & explained by some reference to the particular powers subjoind, the answer is at hand, that altho' it might easily have been done, and experience shows it might be well if it had been done, yet the omission is accounted for by an inattention to the phraseology, occasioned, doubtless, by its identity with the harmless character attached to it in the instrument from which it was borrowed.

But may it not be asked with infinitely more propriety, and without the possibility of a satisfactory answer, why, if the terms were meant to embrace not only all the powers particularly expressed, but the indefinite power which has been claimed under them, the intention was not so declared; why, on that supposition, so much critical labor was employed in enumerating the particular powers, and in defining and limiting their extent?

The variations & vicissitudes in the modification of the clause in which the terms 'common defence & general welfare' appear, are remarkable, and to be not otherwise explaind than by differences of opinion concerning the necessity or the form of a constitutional provision for the debts of the Revolution; some of the members apprehending improper claims for losses, by depreciated emissions of bills of credit; others an evasion of proper claims if not positively brought within the authorized functions of the new Govt., and others again considering the past debts of the U. States as sufficiently secured by the principle that no change in the Govt. could change the obligations of the nation. Besides the indications in the Journal, the history of the period sanctions this explanation.

But it is to be emphatically remarked, that in the multitude of motions, propositions, and amendments, there is not a single one having reference to the terms 'common defence & general welfare' unless we were so to understand the proposition containing them made on Aug. 25, which was disagreed to by all the States except one.

The obvious conclusion to which we are brought is, that these terms copied from the Articles of Confederation, were regarded in the new as in the old instrument, merely as general terms explained & limited by the subjoined specifications; and therefore requiring no critical attention or studied precaution.

If the *practice* of the Revolutionary Congress be pleaded in opposition to this view of the case, the plea is met by the notoriety that on several accounts the practice of that Body is

not the expositor of the 'Articles of Confederation.' These articles were not in force till they were finally ratified by Maryland in 1781. Prior to that event, the power of Congress was measured by the exigencies of the war, and derived its sanction from the acquiescence of the States. After that event, habit and a continued expediency, amounting often to a real or apparent necessity, prolonged the exercise of an undefined authority; which was the more readily overlooked, as the members of the body held their seats during pleasure, as its acts, particularly after the failure of the Bills of Credit, depended for their efficacy on the will of the States; and as its general impotency became manifest. Examples of departure from the prescribed rule, are too well known to require proof. The case of the old Bank of N. America might be cited as a memorable one. The incorating ordinance grew out of the inferred necessity of such an Institution to carry on the war, by aiding the finances which were starving under the neglect or inability of the States to furnish their assessed quotas. Congress was at the time so much aware of the deficient authority, that they recommended it to the State Legislatures to pass laws giving due effect to the ordinance; which was done by Pennsylvania and several other States. In a little time, however, so much dissatisfaction arose in Pennsylvania, where the bank was located, that it was proposed to repeal the law of the State in support of it. This brought on attempts to vindicate the adequacy of the power of Congress to incorporate such an Institution. Mr. Wilson, justly distinguished for his intellectual powers, being deeply impressed with the importance of a bank at such a crisis, published a small pamphlet entitled 'Considerations on the Bank of N. America,' in which he endeavored

to derive the power from the *nature* of the union in which the Colonies were declared & became independent States, and also from the tenor of the 'Articles of Confederation' themselves. But what is particularly worthy of notice is, that with all his anxious search in those articles for such a power he never glanced at the terms 'common defence & general welfare' as a source of it. He rather chose to rest the claim on a recital in the text, 'that for the more convenient management of the *general* interests of the *United* States, Delegates shall be annually appointed to meet in Congress, which, he said, implied that the *United* States had *general* rights, *general* powers, and *general* obligations, not derived from *any* particular State, nor from *all* the particular States taken separately, but resulting from the *union* of the whole,' these general powers not being controlled by the Article declaring that each State retained *all* powers not granted by the articles, because 'the *individual* States *never* possessed & could not retain a *general* power over the others.'

The authority & argument here resorted to, if proving the ingenuity & patriotic anxiety of the author on one hand, show sufficiently on the other, that the terms common defence and general welfare cd. not, according to the known acceptation of them, avail his object.

That the terms in question were not suspected in the Convention which formed the Constitution of any such meaning as has been constructively applied to them may be pronounced with entire confidence. For it exceeds the possibility of belief, that the known advocates in the Convention for a jealous grant & cautious definition of Federal powers, should

have silently permitted the introduction of words or phrases in a sense rendering fruitless the restrictions & definitions elaborated by them.

Consider for a moment the immeasurable difference between the Constitution limited in its powers to the enumerated objects; and expounded as it would be by the import claimed for the phraseology in question. The difference is equivalent to two Constitutions, of characters essentially contrasted with each other, the one possessing powers confined to certain specified cases, the other extended to all cases whatsoever; for what is the case that would not be embraced by a general power to raise money, a power to provide for the general welfare, and a power to pass all laws necessary & proper to carry these powers into execution; all such provisions and laws superseding at the same time, all local laws & constitutions at variance with them. Can less be said, with the evidence before us furnished by the Journal of the Convention itself, than that it is impossible that such a Constitution as the latter would have been recommended to the States by all the members of that Body whose names were subscribed to the instrument.

Passing from this view of the sense in which the terms common defence & general welfare were used by the Framers of the Constitution, let us look for that in which they must have been understood by the Conventions, or rather by the people, who thro' their Conventions, accepted & ratified it. And here the evidence is if possible still more irresistible, that the terms could not have been regarded as giving a scope to federal legislation, infinitely more objectionable than any of the specified powers which

produced such strenuous opposition, and calls for amendments which might be safeguards against the dangers apprehended from them.

Without recurring to the published debates of those Conventions, which, as far as they can be relied on for accuracy, would it is believed not impair the evidence furnished by their recorded proceedings, it will suffice to consult the list of amendments proposed by such of the Conventions as considered the powers granted to the new Government too extensive or not safely defined.

Besides the restrictive & explanatory amendments to the text of the Constitution it may be observed, that a long list was premised under the name and in the nature of 'Declarations of Rights;' all of them indicating a jealousy of the federal powers, and an anxiety to multiply securities against a constructive enlargement of them. But the appeal is more particularly made to the number & nature of the amendments proposed to be made specific & integral parts of the Constitutional text.

No less than seven States, it appears, concurred in adding to their ratifications a series of amendments wch. they deemed requisite. Of these amendments, *nine* were proposed by the Convention of Massachusetts, *five* by that of S. Carolina, *twelve* by that of N. Hampshire, *twenty* by that of Virginia, *thirty-three* by that of N. York, *twenty-six* by that of N. Carolina, *twenty-one* by that of R. Island.

Here are a majority of the States, proposing amendments, in one instance thirty-three by a single State; all of them intended to circumscribe the powers granted to the General

Government, by explanations, restrictions or prohibitions, without including a single proposition from a single State referring to the terms common defence & general welfare; which if understood to convey the asserted power, could not have failed to be the power most strenuously aimed at, because evidently more alarming in its range, than all the powers objected to put together; and that the terms should have passed altogether unnoticed by the many eyes wch. saw danger in terms & phrases employed in some of the most minute & limited of the enumerated powers, must be regarded as a demonstration, that it was taken for granted that the terms were harmless, because explained & limited as in the 'Articles of Confederation,' by the enumerated powers which followed them.

A like demonstration, that these terms were not understood in any sense that could invest Congress with powers not otherwise bestowed by the constitutional charter, may be found in what passed in the first session of the first Congress, when the subject of amendments was taken up, with the conciliatory view of freeing the Constitution from objections which had been made to the extent of its powers, or to the unguarded terms employed in describing them. Not only were the terms 'common defence and general welfare' unnoticed in the long list of amendments brought forward in the outset; but the Journals of Congs. show that, in the progress of the discussions, not a single proposition was made in either branch of the Legislature which referred to the phrase as admitting a constructive enlargement of the granted powers, and requiring an amendment guarding against it. Such a forebearance & silence on such an occasion, and among so many members who belonged to the part of the nation which

called for explanatory & restrictive amendments, and who had been elected as known advocates for them, cannot be accounted for without supposing that the terms 'common defence & general welfare' were not at that time deemed susceptible of any such construction as has since been applied to them.

It may be thought, perhaps, due to the subject, to advert to a letter of Octr. 5, 1787, to Samuel Adams, and another of Oct. 16 of the same year to the Governor of Virginia, from R. H. Lee, in both which it is seen that the terms had attracted his notice, and were apprehended by him 'to submit to Congress every object of human Legislation.' But it is particularly worthy of Remark, that, although a member of the Senate of the U. States, when amendments of the Constitution were before that house, and sundry additions & alterations were there made to the list sent from the other, no notice was taken of these terms as pregnant with danger. It must be inferred that the opinion formed by the distinguished member at the first view of the Constitution, & before it had been fully discussed & elucidated, had been changed into a conviction that the terms did not fairly admit the construction he had originally put on them, and therefore needed no explanatory precaution agst. it.

Allow me, my dear sir, to express on this occasion, what I always feel, an anxious hope that as our Constitution rests on a middle ground between a form wholly national and one merely federal, and on a division of the powers of the Govt. between the States in their united character and in their individual character, this peculiarity of the system will be kept in view, as a key to the sound interpreta-

tion of the instrument, and a warning agst. any doctrine that would either enable the States to invalidate the powers of the U. States, or confer all power on them.

I close these remarks which I fear may be found tedious with assurances of my great esteem, and best regards."

"Supplement to the letter of November 27, 1830, to A. Stevenson, on the phrase 'common defence and general welfare.'—On the power of indefinite appropriation of money by Congress.

It is not to be forgotten, that a distinction has been introduced between a power merely to appropriate money to the common defence & general welfare, and a power to emplow all the means of gviing full effect to objects embraced by the terms.

1. The first observation to be here made is, that an *express* power to appropriate money authorized to be raised, to objects authorized to be provided for, could not, as seems to have been supposed, be at all necessary; and that the insertion of the power 'to pay the debts,' &c., is not to be referred to that cause. It has been seen, that the particular expression of the power originated in a cautious regard to debts of the United States antecedent to the radical change in the Federal Government; and that, but for that consideration, no particular expression of an appropriating power would probably have been thought of. An express power to raise money, and an express power (for example) to raise an army, would surely imply a power to use the money for that purpose. And if a doubt could possibly arise

as to the implication, it would be completely removed by the express power to pass all laws necessary and proper in such cases.

2. But admitting the distinction as alleged, the appropriating power to all objects of 'common defence and general welfare' is itself of sufficient magnitude to render the preceding views of the subject applicable to it. Is it credible that such a power would have been unnoticed and unopposed in the Federal Convention? in the State Conventions, which contended for, and proposed restrictive and explanatory amendments? and in the Congress of 1789, which recommended so many of these amendments? A power to impose *unlimited taxes* for *unlimited purposes* could never have escaped the sagacity and jealousy which were awakened to the many inferior and minute powers which were criticised and combated in those public bodies.

3. A power to appropriate money, without a power to apply it in execution of the object of appropriation, could have no effect but to lock it up from public use altogether; and if the appropriating power carries with it the power of application and execution, the distinction vanishes. The power, therefore, means nothing, or what is worse than nothing, or it is the same thing with the sweeping power 'to provide for the common defence and general welfare.'

4. To avoid this dilemma, the consent of the States is introduced as justifying the exercise of the power in the full extent within their respective limits. But it would be a new doctrine, that an extra-constitutional consent of the parties to a Constitution could amplify the

jurisdiction of the constituted Government. And if this could not be done by the concurring consents of all the States, what is to be said of the doctrine that the consent of an individual State could authorize the application of money belonging to all the States to its individual purposes? Whatever be the presumption that the Government of the whole would not abuse such an authority by a partiality in expending the public treasure, it is not the less necessary to prove the existence of the power. The Constitution is a limited one, possessing no power not actually given, and carrying on the face of it a distrust of power beyond the distrust indicated by the ordinary forms of free Government.

The peculiar structure of the Government, which combines an equal representation of unequal numbers in one branch of the Legislature, with an equal representation of equal numbers in the other, and the peculiarity which invests the Government with selected powers only, not intrusting it even with every power withdrawn from the local governments, prove not only an apprehension of abuse from ambition or corruption in those administering the Government, but of oppression or injustice from the separate interests or views of the constituent bodies themselves, taking effect through the administration of the Government. These peculiarities were thought to be safeguards due to minorities having peculiar interests or institutions at stake, against majorities who might be tempted by interest or other motives to invade them; and all such minorities, however composed, act with consistency in opposing a latitude of construction, particularly that which has been applied to the terms 'common defence and general welfare,'

which would impair the security intended for minor parties. Whether the distrustful precaution interwoven in the Constitution was or was not in every instance necessary; or how far, with certain modifications, any farther powers might be safely and usefully granted, are questions which were open for those who framed the great Federal Charter, and are still open to those who aim at improving it. But while it remains as it is its true import ought to be faithfully observed; and those who have most to fear from constructive innovations ought to be most vigilant in making head against them.

But it would seem that a resort to the consent of the State Legislatures, as a sanction to the appropriating power, is so far from being admissible in this case, that it is precluded by the fact that the Constitution has expressly provided for the cases where that consent was to sanction and extend the power of the national Legislature. How can it be imagined that the Constitution, when pointing out the cases where such an effect was to be produced, should have deemed it necessary to be positive and precise with respect to such minute spots as forts, &c., and have left the general effect ascribed to such consent to an argumentative, or, rather, to an arbitrary construction? And here again an appeal may be made to the incredibility that such a mode of enlarging the sphere of federal legislation should have been unnoticed in the ordeals through which the Constitution passed, by those who were alarmed at many of its powers bearing no comparison with that source of power in point of importance.

5. Put the case that money is appropriated to a canal to be cut within a particular State; how and by whom, it may be asked, is the

money to be applied and the work to be executed? By agents under the authority of the General Government? then the power is no longer a mere appropriating power. By agents under the authority of the States? then the State becomes either a branch or a functionary of the Executive authority of the United States; an incongruity that speaks for itself.

6. The distinction between a pecuniary power only, and a plenary power 'to provide for the common defence and general welfare,' is frustrated by another reply to which it is liable. For if the clause be not a mere introduction to the enumerated powers, and restricted to them, the power to provide for the common defence and general welfare stands as a distinct substantive power, the first on the list of legislative powers; and not only involving all the powers incident to its execution, but coming within the purview of the clause concluding the list, which expressly declares that Congress may make all laws necessary and proper to carry into execution the *foregoing* powers vested in Congress.

The result of this investigation is, that the terms 'common defence and general welfare' owed their induction into the text of the Constitution to their connexion in the 'Articles of Confederation,' from which they were copied, with the debts contracted by the old Congress, and to be provided for by the new Congress; and are used in the one instrument as in the other, as general terms, limited and explained by the particular clauses subjoined to the clause containing them; that in this light they were viewed throughout the recorded proceedings of the Convention which framed the Constitution; that the same was the light in which they were viewed by the State Conventions

which ratified the Constitution, as is shown by the records of their proceedings; and that such was the case also in the first Congress under the Constitution, according to the evidence of their journals, when digesting the amendments afterward made to the Constitution. It equally appears that the alleged power to appropriate money to the 'common defence and general welfare' is either a dead letter, or swells into an unlimited power to provide for unlimited purposes, by all the means necessary and proper for those purposes. And it results finally, that if the Constitution does not give to Congress the unqualified power to provide for the common defence and general welfare, the defect cannot be supplied by the consent of the States, unless given in the form prescribed by the Constitution itself for its own amendment.

As the people of the United States enjoy the great merit of having established a system of Government on the basis of human rights, and of giving to it a form without example, which, as they believe, unites the greatest national strength with the best security for public order and individual liberty, they owe to themserves, to their posterity, and to the world, a preservation of the system in its purity, its symmetry, and its authenticity. This can only be done by a steady attention and sacred regard to the chartered boundaries between the portion of power vested in the Government over the whole, and the portion undivested from the several Governments over the parts composing the whole; and by a like attention and regard to the boundaries between the several departments, Legislative, Executive, and Judiciary, into which the aggregate power is divided. Without a steady eye to the land-marks between these departments, the danger is always

to be apprehended, either of mutual encroachments, and alternate ascendencies incompatible with the tranquil enjoyment of private rights, or of a concentration of all the departments of power into a single one, universally acknowledged to be fatal to public liberty.

And without an equal watchfulness over the great landmarks between the General Government and the particular Governments, the danger is certainly not less, of either a gradual relaxation of the band which holds the latter together, leading to an entire separation, or of a gradual assumption of their powers by the former, leading to a consolidation of all the Governments into a single one.

The two vital characteristics of the political system of the United States are, first, that the Government holds its powers by a charter granted to it by the people; second, that the powers of Government are formed into two grand divisions—one vested in a Government over the whole community, the other in a number of independent Governments over its component parts. Hitherto charters have been written grants of privileges by Governments to the people. Here they are written grants of power by the people to their Governments.

Hitherto, again, all the powers of Government have been, in effect, consolidated into one Government, tending to faction and a foreign yoke among a people within narrow limits, and to arbirtrary rule among a people spread over an extensive region. Here the established system aspires to such a division and organization of power as will provide at once for its harmonious exercise on the true principles of liberty over the parts and over the whole, notwithstanding the great extent of the whole;

the system forming an innovation and an epoch in the science of Government no less honorable to the people to whom it owed its birth, than suspicious to the political welfare of all others who may imitate or adopt it.

As the most arduous and delicate task in this great work lay in the untried demarkation of the line which divides the general and the particular Governments by an enumeration and definition of the powers of the former, more especially the legislative powers; and as the success of this new scheme of polity essentially depends on the faithful observance of this partition of powers, the friends of the scheme, or rather the friends of liberty and of man, cannot be too often earnestly exhorted to be watchful in marking and controlling encroachments by either of the Governments on the domain of the other."

In his letter to Edmund Pendleton, dated January 21, 1792, Madison's Works, Vol. I, p. 545, he says:

"I have reserved for you a copy of the Report of the Secretary of the Treasury on Manufactures, for which I hoped to have found before this a private conveyance, it being rather bulky for the mail. Having not yet succeeded in hitting on an opportunity, I send you a part of it in a newspaper, which broaches a new Constitutional doctrine of vast consequence, and demanding the serious attention of the public. I consider it myself as subverting the fundamental and characteristic principle of the Government; as contrary to the true and fair, as well as the received construction, and as bidding defiance to the sense in which the Constitution is known to have been proposed, advo-

> cated, and adopted. If Congress can do whatever in their *discretion* can be *done by money,* and will promote the *General Welfare,* the Government is no longer a limited one, possessing enumerated powers, but an indefinite one, subject to particular exceptions. It is to be remarked that the phrase out of which this doctrine is elaborated is copied from the old Articles of Confederation, where it was always understood as nothing more than a general caption to the specified powers, and it is a fact that it was preferred in the new instrument for that very reason, as less liable than any other to misconstruction."

Madison's statement with reference to the General Welfare Clause in the XLI Federalist is incorporated in the main brief.

Among the Virginia Resolutions of 1799, with respect to the Alien and Sedition laws, two of them, attributed to Madison, read as follows:

> " 'That this Assembly doth explicitly and peremptorily declare, that it views the powers of the Federal Government as resulting from the compact to which the States are parties, as limited by the plain sense and intention of the instrument constituting that compact—as no further valid than they are authorized by the grants enumerated in that compact; and that in case of a deliberate, palpable, and dangerous exercise of other powers, not granted by the said compact, the States who are parties thereto have the right and are in duty bound to interpose for arresting the progress of the evil, and for maintaining within their respective limits the authorities, rights, and liberties appertaining to them.' "

"'That the General Assembly doth also express its deep regret that a spirit has in sundry instances been manifested by the Federal Government to enlarge its powers by forced constructions of the constitutional charter which defines them; and that indications have appeared of a design to expound certain general phrases, (which, having been copied from the very limited grant of powers in the former Articles of Confederation, were the less liable to be misconstrued), so as to destroy the meaning and effect of the particular enumeration which necessarily explains and limits the general phrases, and so as to consolidate the States by degrees into one sovereignty, the obvious tendency and inevitable result of which would be to transform the present republican system of the United States into an absolute, or at best a mixed, monarchy.'"

In the Report on the Virginia Resolutions it is said:

"The other questions presenting themselves are—1. Whether indications have appeared of a design to expound certain general phrases copied from the 'Articles of Confederation,' so as to destroy the effect of the particular enumeration explaining and limiting their meaning. 2. Whether this exposition would by degrees consolidate the States into one sovereignty. 3. Whether the tendency and result of this consolidation would be to transform the republican system of the United States into a monarchy.

1. The general phrases here meant, must be those 'of providing for the common defence and general welfare.'

In the 'Articles of Confederation,' phrases are used as follows, in Article VIII: 'All charges of war, and all other expenses that shall be incurred *for the common defence and general welfare,* and allowed by the United States in Congress assembled, shall be defrayed out of the common treasury, which shall be supplied by the several States in proportion to the value of all land within each State, granted to or surveyed for any person, as such land and the buildings and improvements thereon shall be estimated, according to such mode as the United States, in Congress assembled, shall from time to time direct and appoint.'

In the existing Constitution they make the following part of Section 8: 'The Congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defence and general welfare of the United States.'

This similarity in the use of these phrases, in the two great Federal charters, might well be considered as rendering their meaning less liable to be misconstrued in the latter; because it will scarcely be said that in the former they were ever understood to be either a general grant of power, or to authorize the requisition or application of money by the old Congress to the common defence and general welfare, except in the cases afterwards enumerated, which explained and limited their meaning; and if such was the limited meaning attached to these phrases in the very instrument revised and re-modeled by the present Constitution, it can never be supposed that, when copied into this Constitution, a different meaning ought to be attached to them.

That, notwithstanding this remarkable security against misconstruction, a design has been

indicated to expound these phrases in the Constitution so as to destroy the effect of the particular enumeration of powers by which it explains and limits them, must have fallen under the observation of those who have attended to the course of public transactions. Not to multiply proofs on this subject, it will suffice to refer to the Debates of the Federal Legislature, in which arguments have on different occasions been drawn, with apparent effect, from these phrases in their indefinite meaning.

To these indications might be added, without looking further, the official Report on Manufactures, by the late Secretary of the Treasury, made on the 5th of December, 1791, and the Report of a Committee of Congress, in January, 1797, on the promotion of Agriculture. In the first of these it is expressly contended to belong 'to the discretion of the National Legislature to pronounce upon the objects which concern the *general welfare,* and for which, under that description, an appropriation of money is requisite and proper. And there seems to be no room for a doubt that whatever concerns the general interests of LEARNING, of AGRICULTURE, of MANUFACTURES, and of COMMERCE, are within the sphere of the National Councils, *as far as regards an application of money'*. The latter Report assumes the same latitude of power in the national councils, and applies it to the encouragement of agriculture by means of a society to be established at the seat of Government. Although neither of these Reports may have received the sanction of a law carrying it into effect, yet, on the other hand, the extraordinary doctrine contained in both has passed without the slightest positive mark of disapprobation from the authority to which it was addressed.

Now, whether the phrases in question be construed to authorize every measure relating to the common defence and general welfare, as contended by some—or every measure only in which there might be an application of money, as suggested by the caution of others—the effect must substantially be the same, in destroying the import and force of the particular enumeration of powers which follow these general phrases in the Constitution; for it is evident that there is not a single power whatever which may not have some reference to the common defence or the general welfare; nor a power of any magnitude, which in its exercise does not involve or admit an application of money. The government, therefore, which possesses power in either one or other of these extents, is a government without the limitations formed by a particular enumeration of powers; and, consequently, the meaning and effect of this particular enumeration is destroyed by the exposition given to these general phrases.

This conclusion will not be affected by an attempt to qualify the power over the 'general welfare', by referring it to cases where the *general welfare* is beyond the reach of separate provisions by the *individual States,* and leaving to these their jurisdictions in cases to which their separate provisions may be competent; for, as the authority of the individual States must in all cases be incompetent to general regulations operating through the whole, the authority of the United States would be extended to every object relating to the general welfare which might, by any possibility, be provided for by the general authority. This qualifying construction, therefore, would have little, if any, tendency to circumscribe the power claimed under the latitude of the terms 'general welfare.'

The true and fair construction of this expression, both in the original and existing Federal compacts, appears to the committee too obvious to be mistaken. In both, the Congress is authorized to provide money for the common defence and *general welfare.* In both, is subjoined to this authority an enumeration of the cases to which their powers shall extend. Money cannot be applied to the *general welfare,* otherwise than by an application of it to some *particular* measure conducive to the general welfare. Whenever, therefore, money has been raised by the general authority, and is to be applied to the particular measure, a question arises whether the particular measure be within the enumerated authorities vested in Congress. If it be, the money requisite for it may be applied to it; if it be not, no such application can be made. This fair and obvious interpretation coincides with and is enforced by the clause in the Constitution which declares that 'no money shall be drawn from the Treasury, but in consequence of appropriations by law.' An appropriation of money to the general welfare would be deemed rather a mockery than an observance of this constitutional injunction.

2. Whether the exposition of the general phrases here combatted would not by degrees consolidate the States into one sovereignty, is a question concerning which the committee can perceive little room for difference of opinion. To consolidate the States into one sovereignty, nothing more can be wanted than to supersede their respective sovereignties in the cases reserved to them, by extending the sovereignty of th United States to all cases of the 'general welfare'—that is to say, *to all cases whatever.*

3. That the obvious tendency and inevitable

result of a consolidation of the States into one sovereignty, would be to transform the republican system of the United States into a monarchy, is a point which seems to have been sufficiently decided by the general sentiment of America. In almost every instance of discussion relating to the consolidation in question, its certain tendency to pave the way to monarchy seems not to have been contested. The prospect of such a consolidation has formed the only topic of controversy. It would be unnecessary, therefore, for the committee to dwell long on the reasons which support the position of the General Assembly. It may not be improper, however, to remark two consequences evidently flowing from an extension of the Federal powers to every subject falling within the idea of the 'general welfare.'

One consequence must be, to enlarge the sphere of discretion allotted to the Executive Magistrate. Even within the legislative limits properly defined by the Constitution, the difficulty of accommodating legal regulations to a country so great in extent and so various in its circumstances has been much felt and has led to occasional investments of powers in the Executive, which involve perhaps as large a portion of discretion as can be deemed consistent with the nature of the Executive trust. In proportion as the objects of legislative care might be multiplied, would the time allowed for each be diminished, and the difficulty of providing uniform and particular regulations for all be increased. From these sources would necessarily ensue a greater latitude to the agency of that department which is always in existence, and which could best mould regulations of a general nature so as to suit them to the diversity of particular situ-

ations. And it is in this latitude, as a supplement to the deficiency of the laws, that the degree of Executive prerogative materially consists.

The other consequence would be, that of an excessive augmentation of the offices, honors, and emoluments, depending on the Executive will. Add to the present legitimate stock all those of every description which a consolidation of the States would take from them and turn over to the Federal Government, and the patronage of the Executive would necessarily be as much swelled in this case as its prerogative would be in the other.

This disproportionate increase of prerogative and patronage must, evidently, either enable the Chief Magistrate of the Union, by quiet means, to secure his re-election from time to time, and finally to regulate the succession as he might please; or, by giving so transcendent an importance to the office, would render the elections to it so violent and corrupt, that the public voice itself might call for an hereditary in place of an elective succession. Whichever of these events might follow, the transformation of the republican system of the United States into a monarchy, anticipated by the General Assembly from a consolidation of the States into one sovereignty, would be equally accomplished; and whether it would be into a mixed or an absolute monarchy might depend on too many contingencies to admit of any certain foresight."

Writings of James Madison, Hunt Edition, Vol. VI, p. 431.

MONROE

In his First Annual Message of December 2, 1817, Monroe said, with reference to internal revenue improvements that he had not considered the power granted to Congress under the Constitution to appropriate money therefor.

On May 4, 1822, he vetoed an act for the preservation and repair of the Cumberland Road on the ground that the appropriation was beyond the power of Congress. On the same day, he transmitted a long message stating his views on the subject of internal improvements, and on the constitutional power with reference thereto. It was in this message that he stated:

> "From this view of the right to appropriate and of the practice under it I think that I am authorized to conclude that the right to make internal improvements has not been granted by the power 'to pay the debts and provide for the common defense and general welfare,' included in the first of the enumerated powers; that that grant conveys nothing more than a right to appropriate the public money, and stands on the same ground with the right to lay and collect taxes, duties, imposts, and excises, conveyed by the first branch of that power; that the Government itself being limited, both branches of the power to raise and appropriate the public money are also limited, the extent of the Government as designated by the specific grants marking the extent of the power in both branches, extending, however, to every object embraced by the fair scope of those grants and not confined to a strict con-

struction of their respective powers, it being safer to aid the purposes of those grants by the appropriation of money than to extend by a forced construction the grant itself; that although the right to appropriate the public money to such improvements affords a resource indispensably necessary to such a scheme, it is nevertheless deficient as a power in the great characteristics on which its execution depends.

"The substance of what has been urged on this subject may be expressed in a few words. My idea is that Congress have an unlimited power to raise money, and that in its appropriation they have a discretionary power, restricted only by the duty to appropriate it for purposes of common defense and of general, not local, national, not State, benefit."

Messages and Papers of the Presidents, Vol. II, pp. 144-173.

JACKSON

Jackson adopted the view expressed by Monroe in his message of May 4, 1822. Jackson in his Veto Message of May 27, 1830, returning without approval a bill proposing to authorize a subscription of stock to a turnpike road company says:

"The bill before me does not call for a more definite opinion upon the particular circumstances which will warrant appropriations of money by Congress to aid works of internal improvement, for although the extension of the power to apply money beyond that of carrying into effect the object for which it is appropriated has, as we have seen, been long claimed and exercised by the Federal Government, yet such grants have always been professedly under

the control of the general principle that the works which might be thus aided should be 'of a general, not local, national, not State,' character. A disregard of this distinction would of necessity lead to the subversion of the federal system. That even this is an unsafe one, arbitrary in its nature, and liable, consequently, to great abuses, is too obvious to require the confirmation of experience. It is, however, sufficiently definite and imperative to my mind to forbid my approbation of any bill having the character of the one under consideration. I have given to its provisions all the reflection demanded by a just regard for the interests of those of our fellow-citizens who have desired its passage, and by the respect which is due to a coordinate branch of the Government, but I am not able to view it in any other light than as a measure of purely local character; or, if it can be considered national, that no further distinction between the appropriate duties of the General and State Governments need be attempted, for there can be no local interest that may not with equal propriety be denominated national. It has no connection with any established system of improvements; is exclusively within the limits of a State, starting at a point on the Ohio River and running out 60 miles to an interior town, and even as far as the State is interested conferring partial instead of general advantages.

Considering the magnitude and importance of the power, and the embarrassments to which, from the very nature of the thing, its exercise must necessarily be subjected, the real friends of internal improvement ought not to be willing to confide it to accident and chance. What is properly national in its character or otherwise is an inquiry which is often extremely difficult of solution. The appropriations of one

year for an object which is considered national may be rendered nugatory by the refusal of a succeeding Congress to continue the work on the ground that it is local. No aid can be derived from the intervention of corporations. The question regards the character of the work, not that of those by whom it is to be accomplished. Notwithstanding the union of the Government with the corporation by whose immediate agency any work of internal improvement is carried on, the inquiry will still remain. Is it national and conductive to the benefit of the whole, or local and operating only to the advantage of a portion of the Union?"

Messages and Papers of the Presidents, Vol. II, pp. 483-487-488.

TYLER

Tyler in his Veto Message of June 11, 1844, Messages and Papers of the Presidents, Vol. IV, p. 330, vetoing an act for making appropriations for improvements of certain harbors and rivers, said:

> "There is, in my view of the subject, no pretense whatever for the claim to power which the bill now returned substantially sets up. The inferential power, in order to be legitimate, must be clearly and plainly incidental to some granted power and necessary to its exercise. To refer it to the head of convenience or usefulness would be to throw open the door to a boundless and unlimited discretion and to invest Congress with an unrestrained authority."

He again distinguishes between certain appropriations in the act, which he thinks come within

the Constitution, of which the Delaware Breakwater is one. He says that others are of mere local concern.

POLK

Polk in a Veto Message of August 3, 1846, Messages and Papers of the Presidents, Vol. IV, p. 460, vetoes an act making appropriation for certain internal improvements on the ground that the act is unconstitutional. He says:

> "The whole frame of the Federal Constitution proves that the Government which it creates was intended to be one of limited and specified powers. A construction of the Constitution so broad as that by which the power in question is defended tends imperceptibly to a consolidation of power in a Government intended by its framers to be thus limited in its authority. 'The obvious tendency and inevitable result of a consolidation of the States into one sovereignty would be to transform the republican system of the United States into a monarchy.' To guard against the assumption of all powers which encroach upon the reserved sovereignty of the States, and which consequently tend to consolidation, is the duty of all the true friends of our political system. That the power in question is not properly an incident to any of the granted powers I am fully satisfied; but if there were doubts on this subject, experience has demonstrated the wisdom of the rule that all the functionaries of the Federal Government should abstain from the exercise of all questionable or doubtful powers. If an enlargement of the powers of the Federal Government should be deemed proper, it is safer

> and wiser to appeal to the States and the people in the mode prescribed by the Constitution for the grant desired than to assume its exercise without an amendment of the Constitution."

In his message of December 5, 1847, Messages and Papers of the Presidents, Vol. IV, p. 610, he explains his reasons for not approving an act to provide for continuing certain works in the Territory of Wisconsin. He followed his earlier view, but in the course of his message said:

> "We have seen in our States that the interests of individuals or neighborhoods, combining against the general interest, have involved their governments in debts and bankruptcy; and when the system prevailed in the General Government, and was checked by President Jackson, it had begun to be considered the highest merit in a member of Congress to be able to procure appropriations of public money to be expended within his district or State, whatever might be the object. We should be blind to the experience of the past if we did not see abundant evidences that if this system of expenditure is to be indulged in combinations of individual and local interests will be found strong enough to control legislation, absorb the revenues of the country, and plunge the Government into a hopeless indebtedness. * * * Such a system is subject, moreover, to be perverted to the accomplishment of the worst of political purposes. During the few years it was in full operation, and which immediately preceded the veto of President Jackson of the Marysville road bill, instances were numerous of public men seeking to gain popular favor by holding out to the people interested in par-

ticular localities the promise of large disbursements of public money. Numerous reconnoissances and surveys were made during that period for roads and canals through many parts of the Union, and the people in the vinicity of each were led to believe that their property would be enhanced in value and they themselves be enriched by the large expenditures which they were promised by the advocates of the system should be made from the Federal Treasury in their neighborhood. Whole sections of the country were thus sought to be influenced, and the system was fast becoming one not only of profuse and wasteful expenditure, but a potent political engine."

PIERCE

President Pierce in his Veto Message of December 30, 1854, Messages and Papers of the Presidents, Vol. V, p. 257, on pages 258 and 259 says:

"It is quite obvious that if there be any constitutional power which authorizes the construction of 'railroads and canals' by Congress, the same power must comprehend turnpikes and ordinary carriage roads; nay, it must extend to the construction of bridges, to the draining of marshes, to the erection of levees, to the construction of canals of irrigation; in a word, to all possible means of the material improvement of the earth, by developing its natural resources anywhere and everywhere, even within the proper juridsiction of the several States. But if there be any constitutional power thus comprehensive in its nature, must not the same power embrace within its scope other kinds of improvements of equal utility in themselves and equally important to the welfare of the whole country? Presi-

dent Jefferson, while intimating the expediency of so amending the Constitution as to comprise objects of physical progress and well-being, does not fail to perceive that 'other objects of public improvement,' including 'public education' by name, belong to the same class of powers. In fact, not only public instruction, but hospitals, establishments of science and art, libraries, and, indeed, everything appertaining to the internal welfare of the country, are just as much objects of internal improvement, or, in other words, of internal utility, as canals and railways.

The admission of the power in either of its senses implies its existence in the other; and since if it exists at all it involves dangerous augmentation of the political functions and of the patronage of the Federal Government, we ought to see clearly by what clause or clauses of the Constitution it is conferred.

I have had occasion more than once to express, and deem it proper now to repeat, that it is, in my judgment, to be taken for granted, as a fundamental proposition not requiring elucidation, that the Federal Government is the creature of the individual States and of the people of the States severally; that the sovereign power was in them alone; that all the powers of the Federal Government are derivative ones, the enumeration and limitations of which are contained in the instrument which organized it; and by express terms 'the powers not delegated to the United States by the Constitution nor prohibited by it to the States are reserved to the States respectively or to the people.'

Starting from this foundation of our constitutional faith and proceeding to inquire in

what part of the Constitution the power of making appropriations for internal improvements is found, it is necessary to reject all idea of there being any grant of power in the preamble. When that instrument says, 'We, the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity,' it only declares the inducements and the anticipated results of the things ordained and established by it. To assume that anything more can be designed by the language of the preamble would be to convert all the body of the Constitution, with its carefully weighed enumerations and limitations, into mere surplusage. The same may be said of the phrase in the grant of the power to Congress 'to pay the debts and provide for the common defense and general welfare of the United States;' or, to construe the words more exactly, they are not significant of grant or concession, but of restriction of the specific grants, having the effect of saying that in laying and collecting taxes for each of the precise objects of power granted to the General Government Congress must exercise any such definite and undoubted power in strict subordination to the purpose of the common defense and general welfare of all the State."

In his Veto Message of May 3, 1854, Messages and Papers of the Presidents, Vol. V, p. 247, returning without approval a bill to make a grant of public lands to the several states for the benefit of indigent insane persons, President Pierce says:

"I shall not discuss at length the question of power sometimes claimed for the General Government under the clause of the eighth section of the Constitution, which gives Congress the power 'to lay and collect taxes, duties, imposts, and excises, to pay debts and provide for the common defense and general welfare of the United States,' because if it has not already been settled upon sound reason and authority it never will be. I take the received and just construction of that article, as if written to lay and collect taxes, duties, imposts, and excises in order to pay the debts and in order to provide for the common defense and general welfare. It is not a substantive general power to provide for the welfare of the United States, but is a limitation on the grant of power to raise money by taxes, duties, and imposts. If it were otherwise, all the rest of the Constitution, consisting of carefully enumerated and cautiously guarded grants of specific powers, would have been useless if not delusive." * * *

"If the time shall ever arrive when, for an object appealing, however strongly, to our sympathies, the dignity of the States shall bow to the dictation of Congress by conforming their legislation thereto, when the power and majesty and honor of those who created shall become subordinate to the thing of their creation, I but feebly utter my apprehensions when I express my firm conviction that we shall see 'the beginning of the end.'" * * *

"To say that it was a charitable object is only to say that it was an object of expenditure proper for the competent authority; but it no more tended to show that it was a proper object of expenditure by the United States than is any other purely local object appealing to the best sympathies of the human heart in

any of the States. And the suggestion that a school for the mental culture of the deaf and dumb in Connecticut or Kentucky is a national object only shows how loosely this expression has been used when the purpose was to procure appropriations by Congress. It is not perceived how a school of this character is otherwise national than is any establishment of religious or moral instructions. All the pursuits of industry, everything which promotes the material or intellectual well-being of the race, every ear of corn or boll of cotton which grows, is national in the same sense, for each one of these things goes to swell the aggregate of national prosperity and happiness of the United States; but it confounds all meaning of language to say that these things are 'national,' as equivalent to 'Federal,' so as to come within any of the classes of appropriation for which Congress is authorized by the Constitution to legislate." * * *

"Messages and Papers of the Presidents," Vol. V, pp. 250-251-255.

CLEVELAND

The Veto Message of President Cleveland of February 16, 1887, Messages and Papers of the Presidents, Vol. VIII, p. 557, returning without approval an act to enable the Commissioner of Agriculture to make distribution of seeds to Texas, and making appropriation therefor, it is said:

"I return without my approval House Bill No. 10203, entitled, 'An act to enable the Commissioner of Agriculture to make a special distribution of seeds in the drought-stricken counties of Texas, and making appropriation therefor.'

"It is represented that a long-continued and extensive drought has existed in certain portions of the State of Texas, resulting in a failure of crops and consequent distress and destitution.

"Though there has been some difference in statements concerning the extent of the people's needs in the localities thus affected, there seems to be no doubt that there has existed a condition calling for relief; and I am willing to believe that, notwithstanding the aid already furnished, a donation of seed grain to the farmers located in this region, to enable them to put in new crops, would serve to avert a continuance or return of an unfortunate blight.

"And yet I feel obliged to withhold my approval of the plan, as proposed by this bill, to indulge a benevolent and charitable sentiment through the appropriation of public funds for that purpose.

"I can find no warrant for such an appropriation in the Constitution, and I do not believe that the power and duty of the General Government ought to be extended to the relief of individual suffering which is in no manner properly related to the public service or benefit. A prevalent tendency to disregard the limited mission of this power and duty should, I think, be steadfastly resisted, to the end that the lesson should be constantly enforced that though the people support the Government the Government should not support the people.

"The friendliness and charity of our countrymen can always be relied upon to relieve their fellow-citizens in misfortune. This has been repeatedly and quite lately demonstrated. Federal aid in such cases encourages the expectation of paternal care on the part of the Gov-

ernment and weakens the sturdiness of our national character, while it prevents the indulgence among our people of that kindly sentiment and conduct which strengthens the bonds of a common brotherhood.

"It is within my personal knowledge that individual aid has to some extent already been extended to the sufferers mentioned in this bill. The failure of the proposed appropriation of $10,000 additional to meet their remaining wants will not necessarily result in continued distress if the emergency is fully made known to the people of the country.

"It is here suggested that the Commissioner of Agriculture is annually directed to expend a large sum of money for the purchase, propagation, and distribution of seeds and other things of this description, two-thirds of which are, upon the request of Senators, Representatives, and Delegates in Congress, supplied to them for distribution among their constituents.

"The appropriation of the current year for this purpose is $100,000, and it will probably be no less in the appropriation for the ensuing year. I understand that a large quantity of grain is furnished for such distribution, and it is supposed that this free apportionment among their neighbors is a privilege which may be waived by our Senators and Representatives.

"If sufficient of them should request the Commissioner of Agriculture to send their shares of the grain thus allowed them to the suffering farmers of Texas, they might be enabled to sow their crops, the constituents for whom in theory this grain is intended could well bear the temporary deprivation, and the donors would experience the satisfaction attending deeds of charity."

In his Veto Message of March 2, 1889, Messages and Papers of the Presidents, Vol. VIII, p. 837, President Cleveland said:

> "It is my belief that this appropriation of the public funds is not within the constitutional power of the Congress. Under the limited and delegated authority conferred by the Constitution upon the General Government the statement of the purposes for which money may be lawfully raised by taxation in any form declares also the limit of the objects for which it may be expended.
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> "All must agree that the direct tax was lawfull and constitutionally laid and that it was rightfully and correctly collected. It cannot be claimed, therefore, nor is it pretended, that any debt arose against the Government and in favor of any State or individual by the exaction of this tax. Surely, then, the appropriation directed by this bill cannot be justified as a payment of a debt of the United States.
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> "The disbursement of this money clearly has no relation to the common defense. On the contrary, it is the repayment of money raised and long ago expended by the Government to provide for the common defense.
>
> "The expenditure cannot properly be advocated on the ground that the general welfare of the United States is thereby provided for or promoted. This 'general welfare of the United States', as used in the Constitution, can only justify apropriations for national objects and for purposes which have to do with the prosperity, the growth, the honor, or the peace and dignity of the nation.

"A sheer, bald gratuity bestowed either upon States or individuals, based upon no better reason than supports the gift proposed in this bill, has never been claimed to be a provision for the general welfare. More than fifty years ago a surplus of public money in the Treasury was distributed among the States; but the unconstitutionality of such distribution, considered as a gift of money, appears to have been conceded, for it was put into the State treasuries under the guise of a deposit or loan, subject to the demand of the Government."

In his Veto Message of May 29, 1896, Messages and Papers of the Presidents, Vol. IX, p. 677, in returning without his approval an act making appropriation for the construction, repair and preservation of certain public works on rivers and harbors and other purposes, President Cleveland says:

"In view of the obligation imposed upon me by the Constitution, it seems to me quite clear that I only discharge a duty to our people when I interpose my disapproval of the legislation proposed.

"Many of the objects for which it appropriates public moneys are not related to the public welfare, and many of them are palpably for the benefit of limited localities or in aid of individual interests. * * *

"To the extent that the appropriations contained in this bill are instigated by private interests and promote local or individual projects their allowance cannot fail to stimulate a vicious paternalism and encourage a sentiment among our people, already too prevalent, that their attachment to our Govern-

ment may properly rest upon the hope and expectation of direct and especial favors and that the extent to which they are realized may furnish an estimate of the value of governmental care."

TREATISES ON CONSTITUTION

In his work on The Constitution, Tucker, Vol. 1, 478 to 480, says:

"It would really seem absurd to impute to the framers of the Constitution a purpose to comprehend objects far beyond the powers it conferred upon the government. It is argued everywhere in the Federalist that power ought to be commensurate with purpose. But this construction, insisted on by Hamilton and his followers, would indicate that the Constitution contemplated the unlimited expenditure of money, to be raised by taxation under governmental power, to carry out objects which were not within the control given, or the powers committed to, Congress. Power and purpose were not commensurate, except that by this construction Congress had unlimited discretion to raise and expend money by taxation, to aid and accomplish purposes and objects that were beyond the power of Congress to effect; which involves the conclusion that the Constitution trusted Congress to spend money for objects which might be regulated and controlled by other governments, but would not trust Congress to create and regulate these objects of appropriation."

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"If, under the Tenth Amendment of the Constitution, a specific power to do a particular thing is not delegated to the United

States by the Constitution, then it is reserved to the States. Such a thing is in no way within the control and discretion of the United States. If it be within the words 'common defense and general welfare,' still, as those words grant no power, Congress cannot exercise it. And yet, despite this, the construction contended for would give to Congress unlimited power to spend any amount of money to carry out a project or scheme clearly and only within the reserved powers of the States. Is it legitimate to give to the power of taxation, which is ordinarily but a means for effecting the purposes of power, the larger function of unlimited discretion in selecting objects not within the delegated power as the recipients of the benefactions of revenue? Is it legitimate thus indirectly to carry into effect an ungranted power—a power which, being ungranted and if not prohibited to the States, is reserved to them? Is not this a usurpation by indirection, through taxation, as flagrant as if it were a bald exercise of the ungranted power? Judge Story says that this construction is conformable to the proposition 'to legislate in all cases for the general interests of the Union.' But that proposition was never adopted, and was rejected. Is it legitimate, then, to conform the construction of the words 'to provide for the common defense and general welfare' to a purpose which was proposed and rejected? It is true that Mr. Hamilton, in his draft of a Constitution, proposed that Congress should have 'power to pass all laws whatsoever, subject to the negative hereafter mentioned,' and that the President should have power to negative all laws pasesd in the State by a Governor or President, who shall be appointed by the general Government. Again, in Article VII of his scheme of a Constitution, he proposed that 'the Legisla-

ture of the United States shall have power to pass all laws which they shall judge necessary to the common defense and general welfare of the Union.' But this proposition of Mr. Hamilton was displaced by the provision of the Constitution which clearly enumerated the powers delegated to Congress." * * *

"If Congress can thus by appropriation exercise this power, it would indirectly exercise a power not granted, and since denied to it. If so, what use would there be for the Tenth Amendment or for Article I, Sec. 1, of the Constitution? It is an anomaly to hold that any government can raise money except as a means to execute its own power. Taxation is a great power; but in itself it does nothing except as it is a means for doing that which is within the powers to be carried out by a government. That a government should have this great means to execute the powers of other governments reaches the point of absurdity. Why should government be given the means to execute a power which is denied to it and confided to another? Why give it the power to help another to do what is denied to it? If Congress cannot be trusted with the grant of a power, why give unlimited discretion to Congress to raise money to enable one not entrusted with the power by Congress to perform it? Can such folly be attributed to the framers of the Constitution? It is obvious that the mass of powers which Congress would thus exercise by means of its revenue powers are powers which are reserved to the States; for the powers not delegated to the United States, unless prohibited to the States, are reserved to them. Thus it would follow that the revenue to be expended by Congress under this construction would be expended for the execution of powers which were reserved to

> the States. The effect then would be that while Congress is denied the particular power, it could effectually execute the power and invade the domain of State reservation by the expenditure of money; and conditioning the expenditure of money upon the substantial concession of power would through money, virtually absorb the autonomy of the States and consolidate the whole Governmental system into centralism."

Willoughby on The Constitutional Law of the United States adopts the Hamilton view. In Section 63, however, he states that an appropriation of public money for a purely private purpose would be unconstitutional. He also takes the view in Section 62 that the power is limited as expressed by Monroe to purposes which must be general and not local.

Warren in his two books, Making of the Constitution and Congress is Santa Claus, reviews the proceedings of the Constitutional Convention. He adopts the view of Mr. Madison with reference to the General Welfare Clause. He analyzes the appropriations which had been made by Congress and which were not within the powers of the General Government as he viewed them. He calls attention to the fact that even under the view of Story, the appropriation must be for a general or national purpose and not for a local one. With respect to the congressional practices, in his Congress is Santa Claus, he says:

"It is only within the last twenty-five years, therefore, that the flood of laws bestowing Government alms has deluged our statute books. Moreover, in only one instance—the Maternity Act—has any attempt been made to test the Constitutionality of these laws in the Supreme Court; and in that instance, the Court held that it had no jurisdicion. Hence, the precedents are not weighty evidence of Congressional power; for, as the Supreme Court has stated in a recent case, the weight of the 'use of Congressional legislation to support or change a particular construction of the Constitution by acquiescence' must depend, in part, 'upon the number of instances in the execution of the law in which opportunity for objection in the Courts or elsewhere is afforded.'

"In view of these conditions as to Legislative precedents, it seems peculiarly unfortunate that the Supreme Court has never rendered a decision upon two fundamentally important questions which would determine the Constitutionality of such legislation—first, whether the Madison or the Hamilton construction of the General Welfare clause is correct; second, whether legislation for the benefit of favored individuals or classes of individuals is within the meaning of the words 'General Welfare.' "